

***United States Court of Appeals
for the Second Circuit***

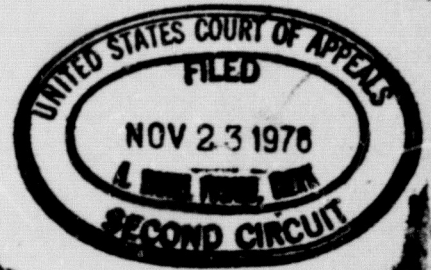


**APPELLANT'S
REPLY BRIEF**

76-7408

Docket No. 76-7408

Defendant-Appellant.



B
P/5

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES W. LAMBERTON

TABLE OF CONTENTS

	<u>Page</u>
Introductory Statement	1
Argument	
I. Scope of Review	2
II. There Have Been No "Judicial Admissions". . .	2
III. Plaintiff May Not Revive His Rejected Joint Venture Claim	3
Conclusion	5

TABLE OF AUTHORITIES

Cases Cited

	<u>Page</u>
<u>Graddy v. Bonsal</u> , 375 F. 2d 764	
(2d Cir. 1967)	4
<u>Klein v. Smigel</u> , 44 A.P.2d 248,	
354 N.Y.S.2d 117 (1st. Dept. 1974),	
aff'd, 36 N.Y.2d 809, 370 N.Y.S.2d	
897 (1975)	4
<u>Stauffer v. McCrory Stores Corp.</u> ,	
155 F.Supp. 710 (W.D. Pa. 1957)	3
<u>United States v. Kahaner</u> , 317 F.2d	
459 (2d Cir. 1963)	3
<u>United States v. Robinson</u> , 361 U.S.	
220 (1960)	4

Other Authorities

5A Moore's Federal Practice (2nd ed. 1975)	2
1 Wigmore on Evidence §12 (1940 ed.)	3

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 76-7408

G. T. FLAMMIA,

Plaintiff-Appellee,

-against-

OSG TAP AND DIE, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

INTRODUCTORY STATEMENT

Plaintiff-appellee's brief fails to respond to numerous issues raised by defendant-appellant on this appeal, including the primary contention that the district court erred as a matter of law in interpreting and applying N.Y.G.O.L. § 5-701(10). Plaintiff's brief, however, raises three issues that should be answered.

POINT I

SCOPE OF REVIEW

Plaintiff asserts that the findings of the district court should not be disturbed, without distinguishing between findings of fact and conclusions of law (Pl. Br. 19-25). It is axiomatic that this Court has no obligation to defer to the district court's legal conclusions. See 5A Moore's Federal Practice (2nd Ed. 1975) ¶52.03[2], pp. 2662-2665.

Where a different standard of review applies, defendant has set it out. See Def. Br. p. 23, fn. 1 (de novo review of written record); Def. Br. p. 28, fn. 1 (abuse of discretion); Def. Br. p. 35, fn. 1 (clearly erroneous finding). Finally, contrary to the suggestion in Plaintiff's Brief, defendant is aware of the district court's findings as to credibility (582A, 592A). Thus, defendant has not relied upon (or, indeed, printed in the Joint Appendix) the testimony of the OSG officers whose credibility was challenged but has relied primarily on plaintiff's testimony in stating the facts.

POINT II

THERE HAVE BEEN NO "JUDICIAL ADMISSIONS"

Plaintiff has argued that, because certain correspondence and memoranda were admitted into evidence by stipulation, "the defendant may not now be heard to criticize the court for considering any one of them", citing Wigmore on Evidence with respect to judicial admissions (Pl. Br. p. 26). The doctrine of

judicial admissions, i.e., formal concessions on matters of fact, has no application to this case. What plaintiff has done is to confuse the admissibility of evidence with the weight to be given to it.

A stipulation as to the relevance and authenticity of a document is not a concession as to its ultimate probative value. As stated in 1 Wigmore on Evidence § 12, p. 296 (1940 ed.):

Admissibility signifies that the fact is relevant and something more,--that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that it is received by the tribunal for the purpose of being weighed with other evidence.

See, e.g., U.S. v. Kahaner, 317 F.2d 459, 471 (2d Cir. 1963); Stauffer v. McCrory Stores Corp., 155 F.Supp. 710 (W.D. Pa. 1957).

POINT III

PLAINTIFF MAY NOT REVIVE HIS REJECTED JOINT VENTURE CLAIM

Plaintiff attempts to support his recovery by reviving the joint venture claim that was rejected by the court below. In this connection, plaintiff makes two complementary arguments as to his role in the transaction in question: first, that he was a joint venturer or prospective participant with defendant in the acquisition of Sossner (Pl. Br. 9, 10, 13, 28, 29, 31); second,

that he was not a finder and had no intention of acting as one (Pl. Br. 29-32).*

The simple response to the claim that plaintiff is entitled to recovery for breach of a joint venture agreement is that the argument was rejected by the district court (594-95A), and plaintiff took no appeal from that judgment. Since plaintiff has not appealed from the rejection of his joint venture claim, this Court lacks jurisdiction to entertain it now. United States v. Robinson, 361 U.S. 220 (1960); Graddy v. Bonsal, 375 F.2d 764 (2d Cir. 1967).

Plaintiff's assertion that § 5-701(10) does not apply at all to this transaction (Pl. Br. 30) is specious. In his original complaint, plaintiff requested a percentage fee, based upon "custom and usage", for performing finder's services (6A). Judge Platt's decision for plaintiff was predicated on his role as a finder and on satisfaction of the requirements of the Statute of Frauds (108-17A, 603-04A). If the plaintiff has not complied with § 5-701(10), there is now no theory upon which he

* Plaintiff's concession that he "never intended to act as a finder" (Pl. Br. 29) reinforces the argument that plaintiff's failure to reach any concrete understanding with defendant bars him from any recovery. As noted in Klein v. Smigel, 44 A.D.2d 248, 354 N.Y.S.2d 117 (1st Dept. 1974), aff'd, 36 N.Y.2d 809, 370 N.Y.S.2d 897 (1975), where a party admits that he never requested compensation and was never told he would be compensated, but merely had an "intimation that he would be taken care of", he may not recover under § 5-701(10) when that intimation is not fulfilled to his satisfaction.

may recover.

CONCLUSION

For the reasons set forth above and in our initial brief, we respectfully request that:

- 1) The orders of the district court, entered on October 6, 1976 and July 15, 1976, be reversed and judgment be entered for defendant-appellant on the ground that New York General Obligations Law § 5-701(10) bars plaintiff-appellee's claim; or
- 2) The order of the district court, entered on July 15, 1976, be reversed and the case remanded to the district court for a new trial limited to the issue of damages.

Dated: New York, New York
November 24, 1976

Respectfully submitted,

CLEARY, GOTTLIEB, STEEN & HAMILTON
Attorneys for Defendant-Appellant
OSG Tap and Die, Inc.
One State Street Plaza
New York, New York 10004
(212) 344-0600

Of Counsel:

JAMES W. LAMBERTON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
G. T. FLAMMIA,

Plaintiff-
Appellee,

-against-

O.S.G. TAP AND DIE, INC.,

Defendant-
Appellant.

:
:
: AFFIDAVIT OF SERVICE
: BY MAIL

:
: Index No. 76-7408
:
:
:
:
:----- x

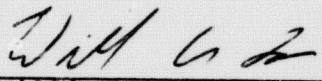
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM A. LOEB , being duly sworn, deposes and says that he is over the age of eighteen years and is in the employ of CLEARY, GOTTLIEB, STEEN & HAMILTON, the attorneys for Defendant-Appellant herein.

That on the 23rd day of November , 1976, he served the within Reply Brief of Defendant-Appellant

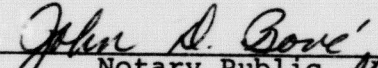
upon the attorneys for the party hereinafter named by depositing a true copy thereof securely enclosed in a postpaid wrapper in a depository regularly maintained and exclusively controlled by the United States Government in the Borough of Manhattan, City, County and State of New York, directed to said attorneys at the address set after their names, the same being the address within the State designated by them for that purpose, or the place where they then kept an office, between which places was then and is now a regular communication by mail:

TO: HANOPHY & LEDWITH
Attorneys for Plaintiff-Appellee
16 Rocklyn Avenue
Lynbrook, New York 11563



William A. Loeb

Sworn to before me this
23rd day of November, 1976.


Notary Public State of N. Y.
Qualified in Queens County
41-4635859
Commission Expires March 30, 1978